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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000439-001 DT 10/06/2011

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
H. Beal
Deputy

TAMMY LYN HALL

TAMMY LYN HALL
1230 E BASELINE RD #103
PMB 104
MESA AZ 85204

v.

V M ASSOCIATES LIMITED PARTNERSHIP (001)
GALLERY PROPERTIES LLC (001)

ALLYSSA B BIRNLEY

HIGHLAND JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC 2010–343058

Defendant Appellant VM Associates Ltd. Partnership (Defendant) appeals the Highland Justice Court's determination awarding them 25% of their requested attorney fees after they won their counterclaim against Plaintiff. Defendant contends the trial court erred. For the reasons stated below, the court affirms the trial court's judgment.

I. FACTUAL BACKGROUND.

This action began when Plaintiff sent a "7 day Demand Letter" requesting the refund of her security deposit and a second letter—dated June 10, 2010—[1]alleging Defendant inappropriately billed her for damaged carpet and vinyl.[2] Plaintiff asserted Defendant failed to allow her to mitigate the damages to the carpet;[3] only provided her with an estimate of the cost of repair; wrongfully withheld her security and pet deposits; and wrongfully withheld $40.24 in prepaid rent. Plaintiff asserted she was entitled to statutory damages because of Defendant's alleged wrongful conduct and requested the sum of $2,190.78. Plaintiff filed an action in small claims court.

[1] Plaintiff's Exhibit 3.
[2] Plaintiff's Exhibit 2.
[3] Plaintiff's Exhibit 1.

Defendant filed a counterclaim[4] alleging Plaintiff damaged the carpeting in the leased premises and requesting an offset against the deposits Plaintiff had with Defendant plus additional damages to cover the cost of the carpet repair. Defendant alleged it had $700.00 in refundable security deposits and—after its total damages were offset by Plaintiff's total security deposits—a balance of $155.40 was owed. Defendant requested an award of $155.40 plus reasonable attorney fees. Defendant also requested the matter be transferred from small claims to the civil division.[5]

The trial court held a trial on February 7, 2011. At trial, Plaintiff admitted she was shown the damage to the carpet.[6] Jenean Nance testified on Defendant's behalf and stated Plaintiff signed a lease agreement.[7] She said Defendant needed to return the apartment in the same condition it was in when she received it.[8] She also said the tenant had the right to be present at the move out inspection.[9] Ms. Nance spoke about the Pet Agreement which required the pet owner to take responsibility for any damages caused by the pet.[10] Ms. Nance testified about Defendant's practice to have the carpet evaluated by a professional service[11] and stated the service recommended carpet replacement because of excessive pet urine and fraying.[12] She stated the total damages owed to Defendant were $155.40.

Defendant was successful and was awarded judgment of $155.40. Defendant also requested attorney fees. The trial court stated it would determine the amount of the attorney fees.[13] The trial court also stated "And my particular history in small claims cases, I don't find real high numbers reasonable at all. FYI."[14] Defendant submitted a form of judgment requesting attorney fees of $2,975.00 plus taxable costs of $50.00 and counsel for Defendant submitted a *China Doll* affidavit. The trial court reduced the attorney fees award to $750.00.

Defendant filed a timely appeal. Plaintiff did not file a responsive brief. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES: DID THE TRIAL COURT ABUSE ITS DISCRETION BY REDUCING THE REQUESTED ATTORNEY FEES.

Defendant correctly posits the standard of review as one of abuse of discretion. *Modular Mining Systems Inc. v. Jigsaw Technologies, Inc*. 221 Ariz. 515, 212 P.3d 853 ¶ 21 (Ct. App. 2009). Because this Court reviews the trial court's actions based on an abuse of discretion

[4] Defendant's Answer and Counterclaim filed July 19, 2010, in CC2010–343058.
[5] Objection and Request to Transfer filed July 14, 2010.
[6] Trial Transcript at page 15. Because the transcript was not printed on lined paper, this Court shall only reference testimony with the page number.
[7] *Id*. at p.18; Defendant's Exhibit 1.
[8] *Id*. at p. 19.
[9] *Id*.
[10] Defendant's Exhibit 2; Trial Transcript at p. 20.
[11] *Id*. at p. 22.
[12] *Id*.
[13] *Id*. at p. 49.
[14] *Id*. at p. 50.

standard, this Court will not change or revise a trial court's determination if there is a reasonable basis for the attorney fees ordered. *ABC Supply, Inc. v. Edwards*, 191 Ariz. 48, 52, 952 P.2d 286, 290 (Ct. App. 1996). A court abuses its discretion when there is no evidence supporting the court's conclusion or the court's reasons are untenable, legally incorrect, or amount to a denial of justice. *Charles I. Friedman, P.C. v. Microsoft Corp*., 213 Ariz. 344, 141 P.3d 824 ¶ 17 (CT. App. 2006). In determining whether a trial court abused its discretion, the Court of Appeals in *Charles I. Friedman, P.C. v. Microsoft Corp*., *id.*, referred to *State v. Chapple.* In *Chapple,* the court held:

> Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers, and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers.

State v. Chapple, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n. 18 (1983) (citation omitted). In this case, the trial judge needed to "assess the factual and equitable considerations which vary from case to case." Consequently, this Court may only review the trial judge's actions to see if the trial court abused its discretion, because the "determination of the reasonable amount of attorney fees was peculiarly within the discretion of the trial court." *Woliansky v. Miller*, 146 Ariz. 170, 172, 704 P.2d 811, 813 (Ct. App. 1985); *Marcus v. Fox*, 150 Ariz. 333, 334, 723 P.2d 682, 683 (1986). Furthermore, "[T] trial court abuses its discretion as to attorneys' fees only when its view would not be taken by a reasonable man." *Moser v. Moser*, 117 Ariz. 312, 315, 572 P.2d 446, 449 (Ct. App. 1977).

Defendant asserts the trial court erred because (1) the reduction in attorney fees contradicts the parties' written agreement; and (2) the court's discretion to reduce fees is limited to those fees which are "clearly excessive". This Court finds Defendant's position is not supported by the facts of this case.

The parties' rental contract[15] does not provide for unfettered fees. The lease agreement specifically states the prevailing party is entitled to (1) all costs, (2) attorney's fees, and (3) other expenses. This Court first notes the express language of the agreement is for attorney's fees and not all attorney's fees. The word "all" modifies the term costs; it does not necessarily refer to

[15]Defendant's Exhibit 1, No. 13 (H) states "All costs, attorney's fees and other expenses of enforcing this Rental Agreement shall be paid to the prevailing party."

attorney fees. This Court recognizes the use of the term "all" in section 13 (H) of the Vista Montana Apartments Rental Agreement (Defendant's Exhibit 1) may be ambiguous. However, by longstanding contract rules, ambiguous contracts are construed against the drafter of the contract. *United California Bank v. Prudential Ins. Co. of America*, 140 Ariz. 238, 258, 681 P.2d 390, 410 (Ct. App. 1983). Equally—if not more—important than the argument about the phrasing of the contract, however, is the fact Defendant only requested "reasonable" attorney fees in its Answer and Counterclaim. Consequently, Plaintiff was only put on notice she ran the risk of paying Defendant's "reasonable" attorney fees and not whatever attorney fees Defendant may have incurred. In *Robert E. Mann Construction Co. v. Liebert Corp.*, 204 Ariz. 129, 60 P.3d 708 (Ct. App. 2003) the Court of Appeals discussed requests for attorney fees based on contract as opposed to attorney fees stemming from A.R.S. § 12–341.01. In ruling, the Court of Appeals said:

> It is fair to require parties to request fees earlier in the litigation process so that both sides may accurately assess the risks and benefits of litigating versus settling.
>
> . . . .
>
> Liebert/ISS only generally asked for attorneys' fees in the prayer section of their answer and did not specifically mention either the purchase order contract or A.R.S. § 12–341.01 until their application for attorneys' fees after remand. . . . If Liebert/ISS wanted attorneys' fees pursuant to the October 27, 1993 purchase order contract they should have specifically raised the basis in their answer. Fees pursuant to A.R.S. § 12–341.01 are another matter.

Robert E. Mann Construction Co. v. Liebert, Corp. at ¶¶ 10 and 12. The situation in the current case is reminiscent of that in *Robert E. Mann Construction Co., id*. In this case, Defendant pled a general request for attorney fees in the prayer for relief of their Answer and Counterclaim. They requested "That Defendant/Counterclaimants be awarded their reasonable attorneys' fees and court costs." This Court recognizes the contract provisions were mentioned in the Answer and Counterclaim.[16] However, there was little information provided to apprise Plaintiff she might run the risk of an attorney fee award that exceeded Defendant's claim by a factor of approximately nineteen times. In this case, Defense counsel requested fees of $2,975 on their claim for $155.40.

The Arizona Supreme Court established factors for courts to consider when reviewing attorney fees requests for reasonableness. These factors include:

1. whether the unsuccessful party's position or defense had merit;
2. whether the litigation could have been avoided, or settled and how the successful party's efforts influenced the result;
3. whether assessing fees against the unsuccessful party would cause extreme hardship;

[16] Answer and Counterclaim, p. 2, l. 16 stating:. . . reasonable attorneys' fees and court costs pursuant to the contract and to A.R.S. §§ 12–341 and 12–341.1, or otherwise provided by law."

4. whether the successful party prevailed with respect to all of the relief sought;
5. whether the legal question was novel;
6. whether a similar claim had been previously adjudicated in this jurisdiction;
7. whether the particular award would discourage other parties with tenable claims or defenses from litigating or defending for fear of incurring liability for substantial amounts of attorney fees.

Assoc. Indem. Corp. v. Warner, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985); *Moedt v. General Motors Corp*., 204 Ariz. 100, 60 P.3d 240 ¶ 19 (Ct. App. 2003). In establishing these factors, the Arizona Supreme Court considered the language of A.R.S. 12–341.01 and cited subsection B which states the award

> . . . should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense. It need not equal or relate to the attorney's fees actually paid or contracted. . . .

Assoc. Indem. Corp. v. Warner, 143 Ariz. at 569, 694 P.2d at 1183. In this case, the action began as a small claims action. Defendant requested the action be reclassified as a civil action. The case was relatively minor and Defendant requested only $155.40 as damages.[17] Plaintiff is unrepresented and, based on her testimony, mostly without funds.[18] Plaintiff instituted the original action in an attempt to mitigate her out of pocket costs for the replacement charge of the carpet. The legal question was not novel. There was little need for extensive discovery. This Court does not have any information about whether the litigation could have been settled earlier; however, Plaintiff did state she tried to resolve the matter out of court.[19] The parties were involved in mediation. In looking at defense counsel's *China Doll* affidavit, this Court notes a large amount of time seems to be spent on what are primarily form pleadings. Defense counsel requested one hour of time to prepare the small Claims Objection, notice of appearance and answer. The small claims objection is a three line form. A notice of appearance is a standard form and the Answer was filed together with the Counterclaim for which defense counsel added an additional 1.25 hourly charge. Defense counsel also billed 0.75 hours for preparation of the Application for Entry of Default and accompanying affidavit and Entry of Default. These, too, are essentially form pleadings. Consequently, because much of defense counsel's work uses form pleadings, and because the case is neither novel nor complex, this Court cannot find the trial court's action in reducing the attorney fee was inherently unreasonable.

This Court cannot determine the precise reason why the trial court reduced the attorney fees by approximately seventy-five per cent (75%) as the trial court did not give the reason for its decision. Instead, the trial court (1) stated it did not favor large attorney fee awards where the

[17] This Court recognizes Plaintiff requested over two thousand dollars in her initial complaint.
[18] At time of trial Plaintiff stated she could not afford an attorney for herself and she had tried to resolve the matter outside of court. Trial Transcript at p. 3.
[19] Trial Transcript, at p. 3.

case began as a small claims action[20] and (2) changed the amount for the attorney fees on the Judgment. This Court notes the trial court is not required to explain its reasons for reducing the attorney fees award.

Despite not having an explanation, however, this Court is guided by the Court of Appeals when it stated:

> We will affirm an award with a reasonable basis even if the trial court gives no reasons for its decision regarding whether to award fees.

Fulton Homes Corp. v. BBP Concrete, 214 Ariz. 566, 155 P.3d 1090 ¶ 9 (Ct. App. 2007). See also *Uyleman v. D.S. Rentco*, 194 Ariz. 300, 981 P.2d 1081 ¶ 27 (Ct. App. 1999) holding:

> Although the trial court gave no reasons for denying the request for fees, we uphold a decision on attorneys' fees under A.R.S. Section 12–341.01 if it has any reasonable basis.

Defendant argues it is inherently unreasonable to reduce its attorney fees by seventy-five per cent (75%) but provides no explanation as to why this is (1) inherently unreasonable or (2) why its attorney fees are so high, preferring to just assert the reasonableness of their position. Nor does the record reflect that Defendant asked the trial court to reconsider its determination about the amount of awarded attorney fees. Instead, Defendant relies on *McDowell Mountain Ranch Community Ass'n, Inc. v. Simons*, 216 Ariz. 266, 165 P.3d 667 (Ct. App. 2007) as support. In *McDowell Mountain Ranch Community Ass'n, id*., the Court of Appeals determined the trial court abused its discretion by only awarding half of the requested attorney fees and remanded to matter to the trial court because the record did not support the trial court's order reducing the fees by fifty per cent (50 %). The contract provision in *McDowell Mountain Ranch Community Ass'n* differed from the contract provision in our case. In *McDowell Mountain Ranch Community Ass'n*, the attorney fees provision stated the party "shall pay . . . all attorney fees and court costs. . . ." *Id.,* 216 Ariz. at ¶ 4, 165 P.3d at ¶ 4. The contract provision in the case before this Court is not as specific—it requests "all costs, attorney fees and other expenses of enforcing this Rental Agreement"—and therefore is distinguishable. Furthermore, in our case, Defendant mentioned attorney fees in accordance with both the contract and the provisions of A.R.S. § 12–341.01 and only included a request for "reasonable" attorney fees in its prayer for relief.

The Court of Appeals in *McDowell Mountain Ranch Community Ass'n, id.,* at ¶ 14, also discussed attorney fees pursuant to A.R.S. § 12–341.01 and said that unlike fees awarded under A.R.S. § 12–341.01 the court had no discretion when awarding fees under a contractual provision. Here, this Court does not know whether the trial court awarded the fees based on the trial court's interpretation of the contract or based on A.R.S. § 12–341.01. Because this Court cannot ascertain which basis the trial court used, and because this Court must affirm the trial

[20] Trial Transcript at p. 50. "And my particular history in small claims cases, I don't find real high numbers reasonable at all." Prior to trial, the trial court also stated—in response to defense counsel's oral motion about Plaintiff's failing to submit a disclosure statement ". . . what I'm not going to do is allow that to be used to basically force defendants or plaintiffs to have to incur a lot of additional costs. . . ." Trial Transcript at p.3.

court's determination where reasonable, this Court finds the trial court had the ability to use its discretion when determining the fee to be awarded. This accords with Defendant's request in its prayer for relief.

Defendant asserts it is unreasonable to reduce attorney fees by seventy five per cent (75 %). Yet, in *ABC Supply, Inc. v. Edwards*, *id*., the Court of Appeals allowed an almost ninety per cent (90 %) reduction in the awarded amount. In *ABC Supply, Inc.*, *id*., the court commented on the need for the judiciary to examine the reasonableness of attorneys' fee applications and quoted from the Preamble to the Ethics Code that a lawyer should not use the law's procedures to harass or intimidate others. *Id.*, 191 Ariz. at 55, 952 P.2d at 293. In the current case, this Court believes the trial court expressed concerns about Defendant's underlying motivation in transferring the case from the small claims court to the civil division and incorporated these concerns in its comments about attorney fees. This case, like *ABC Supply Inc*., *id.*, illustrated a situation where the attorney fees greatly exceeded the amount at issue. The attorney fees were nineteen times greater than the amount Defendant requested and were approximately equal to fifty per cent (50 %) of the amount Plaintiff originally requested. These fees appear to be excessive when compared with the complexity of the case and the result achieved.

Defendant's final point is it took 2.5 hours for trial, 1.25 hours for the pretrial conference, and 2.0 hours for the mediation and Defendant's fees for these three items exceeds the total amount awarded for the case. These figures all include travel time. The travel time is not separate from the time for the court appearances. This Court does not know how much time was involved in travel or if travel was mandated. Nor does this Court know the basis the trial court used in reducing the requested fees. Defendant asserts—at a minimum—it should have been awarded the full fees for the 5.75 hours expended at defense counsel's "reasonable rate" of $200.00 per hour. This Court notes Defendant did not request a hearing on the attorney fees or file a motion requesting the trial court to reconsider the amount of the awarded fees. The determination of the amount of attorney fees under A.R.S. § 12–341.01 is left to the sound discretion of the trial court and it is not this court's function to "look over the shoulder" of the trial court. Furthermore, the rental contract does not unequivocably provide for "all" attorney fees. Instead, this Court concludes the rental agreement provides for reasonable attorney fees.

III. CONCLUSION.

Because the trial court (1) has discretion in assessing the amount of attorney fees under A.R.S. § 12–341.01, and because (2) Defendant requested fees based on this statute as well as on the attorney fees provision in its lease, and because (3) the language in the contract provision could be interpreted to mean reasonable attorney fees rather than all assessed attorney fees, this court finds the trial court had a reasonable basis for deciding to lower the requested attorney fees. The amount of the fees is left to the trial court's sound discretion. Defendant has not demonstrated how the trial court abused its discretion in reducing the attorney fees to $750.00 other than its assertion its fees greatly exceeded the amount awarded. The trial court is not required to award the full amount of attorney fees incurred. Based on the foregoing, this Court concludes the Highland Justice Court did not err.

IT IS THEREFORE ORDERED affirming the judgment of the Highland Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Highland Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court 1005020111615